

**In the United States Court of Appeals
For the Eighth Circuit**

No. 21-1752

STATE OF MINNESOTA, PLAINTIFF-APPELLEE

v.

AMERICAN PETROLEUM INSTITUTE, ET AL.,
DEFENDANTS-APPELLANTS

**RESPONSE OF PLAINTIFF-APPELLEE TO
APPELLANTS' MOTION FOR AN EXTENSION OF TIME TO
FILE APPELLANT BRIEF**

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I. INTRODUCTION

The Court should deny appellants' motion for an extension of time to file their opening brief. Appellants have not shown "good cause" to modify the Court's briefing schedule, as is required by Federal Rule of Appellate Procedure 26(b). Although appellants premise their motion on judicial efficiency, they have delayed the State's case for nearly a year through an improper removal, motions to stay, a petition to appeal under the Class Action Fairness Act ("CAFA"), and the instant appeal. All of the factors asserted by appellants in seeking an extension were present when appellants filed their notice of appeal and when this Court issued its briefing schedule; none warrants granting an extension now.

II. ARGUMENT

The Court may only "extend the time prescribed by these rules or by its order to perform any act" upon a showing of good cause. Fed. R. App. P. 26(b). Likewise, the Court's briefing schedule order issued on April 5, 2021, stated: "The [filing] dates will only be extended upon the filing of a timely motion establishing good cause of an extension of time." Appellants' motion does not even reference the "good cause" standard, let alone establish why that standard is satisfied here, and Appellants cite

only to Federal Rule of Appellate Procedure 27, which governs the general requirements for appellate motion practice.

The fact that the Supreme Court's decision is pending in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, does not support the requested extension. A decision has been pending since oral argument was heard on January 19, 2021. It was pending when appellants filed their notice of appeal. It was pending when this Court issued the briefing schedule for this appeal. Nothing that has occurred in that time warrants a departure from that schedule now. If appellants were concerned with judicial efficiency, they could have sought an extension to file a notice of appeal to allow them to assess whether an appeal would even be warranted following a Supreme Court decision in *Baltimore*. This would have prevented the Court's issuance of a briefing schedule and may have allowed earlier resolution of appellants' separate petition to appeal under the CAFA. But with no regard for the burden on the State or the Court, appellants took us all down the appellate path and filed both this appeal (No. 21-1752) and a CAFA petition (No. 21-8005). Now that path has led to a point where work is required from appellants, and appellants want to stop the process, feigning a concern for judicial efficiency.

The pending petition for certiorari in *Chevron Corp. v. City of Oakland*, No. 20-1089, likewise does not warrant modification of the existing briefing schedule. On March 31, 2021, the district court correctly concluded that “the dispensation of the petition in *City of Oakland* is too speculative to warrant a stay in the . . . proceedings [below].” Dkt. 76. That same logic applies here and is as sound today as it was a month ago.

Any burden on appellants in briefing the issues they chose to appeal is outweighed by the prejudice to the State in continued delay of this case, which has been in limbo for nearly a year. A ruling by the Supreme Court, should it occur in the anticipated timeframe, will not require additional or different briefing from the parties but, as appellants acknowledge, will only “determine the scope of the Court’s review in this appeal.” Mot. ¶ 3. With the issues fully briefed by the parties, this Court will be equipped and well positioned to issue a ruling, independent of what the Supreme Court does in the future. Therefore, moving forward with the ordered briefing schedule will allow an efficient and expeditious resolution of the issues on appeal as well as the CAFA petition, which is being held in abeyance to be considered at the same time as this appeal.

III. CONCLUSION

The State's ultimate concern is the continued delay of its case. The State has been agreeable to reasonable extensions of time in the past, and as noted on the first page of appellants' motion, the State is agreeable to an extension of time here, so long as appellants do not seek to simultaneously stall the state court proceedings through a motion to stay. However, appellants have moved to stay the execution of the district court's remand order based on this very appeal. Thus, given the appellants' delay of the underlying state action, the CAFA petition, and the issues on appeal, the State respectfully requests that the Court deny appellants' motion and continue with the current briefing schedule.

In the alternative, should the Court extend the briefing schedule, the State respectfully submits two requests. First, the State requests the Court act on appellants' CAFA petition without further delay. Second, the State requests appellants' brief be due within 21 days of a decision by the Supreme Court in *Baltimore* and that the briefing deadlines otherwise track the existing briefing schedule (i.e., that the appellee brief be due 30 days following appellants' brief and that the appellants' reply brief be due 21 days after that).

Dated: May 11, 2021

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**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITS**

I, Victor M. Sher, certify, pursuant to Federal Rules of Appellate Procedure 27(d)(1)(E) and (d)(2)(A) and 32(g)(1), that the foregoing Opposition to Appellants' Motion for an Extension of Time to File Appellant Brief is proportionately spaced, has a type-face of 14 points or more, was prepared using Microsoft Word 2016, and contains 850 words. I further certify that the electronic version of this filing was automatically scanned for viruses and found to contain no known viruses.

May 11, 2021

/s/ Victor M. Sher

VICTOR M. SHER

CERTIFICATE OF SERVICE

I, Victor M. Sher, hereby certify that on May 11, 2021, I caused a copy of the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

May 11, 2021

/s/ Victor M. Sher

VICTOR M. SHER